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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/025,345 02/18/98 HINSHAW

J PMS-244198

EXAMINER

PM92/0814

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ART UNIT

PAPER NUMBER

3641

DATE MAILED:

08/14/01

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Paper No. 28

Application Number: 09/025,345  
Filing Date: February 18, 1998  
Appellant(s): HINSHAW ET AL.

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Steven T. Sullivan  
For Appellant

EXAMINER'S ANSWER

This is in response to appellant's brief on appeal filed April 6, 2001.

**(1) *Real Party in Interest***

A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is correct, except that, on reconsideration, claims 83-84 and 116 are free of the prior art. Claims 83-84 and 116 are objected to as depending on a rejected claims.

**(4) *Status of Amendments After Final***

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) *Summary of Invention***

The summary of invention contained in the brief is generally correct, if not concise.

**(6) *Issues***

The appellant's statement of the issues in the brief is correct.

**(7) *Grouping of Claims***

The appellants' statement in the brief that certain claims do not stand or fall together is not agreed with because the Examiner believes that claim 117 stands or falls with claim 85, as will be set forth in detail below.

**(8) *Claims Appealed***

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) *Prior Art of Record***

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3,921,497	Christmann et al. (Christmann)	11-1976
4,925,600	Hommel et al. (Hommel)	5-1990
3,138,498	Rausch	6-1964

**(10) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

1. Claim 1 is rejected under 35 U.S.C. 102(b) as anticipated by each of Cook, Rausch, and Hommel. Each of these references teaches compositions of metal ammine nitrate oxidizer compounds. Claim 1 does not set any limits on the specific compound, the amount thereof in a composition, or in any other way limit the claim, except as to the intended use. It is well settled that a new intended use does not confer patentability on an otherwise old composition. See, for example, *In re Thuau*, 135 F.d 344, 1943 C.D. 390, *In re Pearson*, 181 USPQ 641, and *In re Touminen*, 213 USPQ 89.

2. Claims 1, 85-91, 114-115 and 117 are rejected under 35 U.S.C. 103 (a), as unpatentable over Cook and Hommel in view of Christmann.

Cook and Hommel teach compositions of metal ammine nitrates for use in explosives. Christmann teaches that such explosives comprising ammonium nitrate commonly include additives including salts of fatty acids, col. 2, lines 64-67, exemplified in col. 5, line 57 and col. 6, line 16, as calcium stearate. Further additives which may be included are graphite or molybdenum disulfide, col. 3, lines 13-14. Thus, addition of these conventional additives in the taught minor amounts to explosives of ammonium nitrate, as taught by Cook and Hommel, each teaching ammonium nitrate with metal ammine nitrate in minor amounts for use in ammonium nitrate explosives, would have been obvious. There are no amounts or other limitations which define over these references as applied. The specific cobalt ammine nitrates are notoriously well known, if not specifically taught.

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(Cook teaches metal ammine nitrate salts from cobalt nitrate, page 2, col. 2, line 31.) In any event, variation of conventional additives in Cook and Hommel, for the expected reasons, would have been obvious to the ordinary skilled artisan. It is well settled that optimizing a result effective variable is well within the expected ability of a person of ordinary skill in the subject art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980), *In re Aller*, 220 F.2d 454, 105 USPQ 233 (CCPA 1955).

**(11) Response to Argument**

Appellant argues the italicized wording of claim 1 as reproduced on page 9 of appellants' brief as basis for allowing the claim over the prior art. In the first instance, this language was rejected in Paper No. 14, paragraph 5 thereof, under 35 USC 112 as indefinite. Therein, claim 1 language "such as 'formulated ...'" was rejected as indefinite. It was stated to be indefinite, possibly merely intended use language, but that it was not clear whether this required any specific manner of formulation, or what this language required, beyond an intended use. In appellants' reply, Paper NO 15 submitted June 15, 2000, appellants stated that "Claim 1 relates to the recited solid composition," and that "it is prepared from selected ingredients ...." There was nothing set forth or relied upon regarding any specific form, amounts, or any other meaning, only being solid and that when the composition combusts, nitrogen gas and water vapor are produced. Of course, this is inherent in the chemical elements present in any metal ammine nitrate. Therefore, for appellants to now argue a specific, different meaning, relating to amounts or physical form, is estopped by the prosecution history in this application, e.g., file wrapper estoppel.

To the extent that this refers to the gases produced "when combusted," this is inherent in the elements of the metal complex oxidizer compounds. Ammine and hydrazine yield nitrogen, for nitrogen gas, and hydrogen, for combustion with the oxygen in the nitrate part of the oxidizer to water. This is plain, ordinary chemistry, well known to the chemist of ordinary skill in the art.

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Appellant criticizes Cook as having only a small amount of metal ammine nitrate, 0.1 to 10%. Similar arguments are made for Hommel. These ignore the facts that 1) claim 1 has a scope of “comprising” which allows additional ingredients in any types and amounts, 2) there are no recited amounts for any ingredient, i.e., there is no minimum amount of the complex oxidizer required in claim 1, and 3) the compounds per se are taught, which compounds, as chemicals, anticipate the claim as written.

Regarding Rausch, appellants criticize this composition as a thermite type of composition which would burn so intensely as to destroy or melt the housing. This ignores several facts, including that appellants themselves, on specification page 14, lines 19-24, contemplate metal fuels including aluminum at line 21, exactly as Rausch teaches aluminum metal fuel. The complex oxidizer of claim 1 includes, by its terms, the oxidizer of Rausch. No amounts appear in claim 1. What is sauce for the goose, is sauce for the gander. Beyond this, the argument by attorney is unsupported allegation. Indeed, assignee herein (Cordant Technologies) is the successor of Thiokol Corporation, assignee of Hinshaw et al. 5,439,537, entitled “Thermite Compositions for use as Gas Generators”. Specification page 19, lines 3-5 further suggests that the “thermite” allegation is unsupported in fact. Assignee’s argument would cast doubt on the validity of assignee’s patent; such an unsupported allegation is not acceptable in the USPTO, where issued patents have a presumption of validity. Manifestly, there is no factual basis of record for this allegation.

As appellants’ arguments are written, one might intuit that perhaps the compounds taught in the references are not the compounds claimed. The examiner stated in the prosecution of this case that the compounds, specifically the cobalt ammine nitrates, were notoriously well known. Appellants have never challenged this, and properly so; to leave this hanging would be untoward. Appellants have received a number of patents in this area. Appellants know very well that the

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compounds are notoriously well known, as well as taught in references of record throughout appellants' parent applications, some now patented. Thus, to leave hanging in the wind, by implication or innuendo, something they very well know to be incorrect, is not well taken. On page 11 of appellants' brief, appellants urge that the examiner has not afforded the proper weight to all the claim language. In contrast, the examiner urges he has afforded the correct weight to the claim language that has been established in the prosecution history to date, as set forth above, and in view of the teachings of the references of record. If one looks at Cook, e.g., ammonium nitrate combusts to water, nitrogen, and oxygen. It is not clear or argued which of these gases is unsuitable for air bag use. Indeed, appellants' specification teaches co-oxidizers on page 18, lines 5-7, so the gases produced must be appropriate. It is well that appellants do not dispute the well known intended use case law, as is appropriate. Contrary to appellants' cited *Connor* case, brief page 12, there is no styrene or analogous compound which will preclude suitability. All the compounds of the references are contemplated in appellants' own specification for use in the claims compositions. There is no showing by appellants of any unsuitability, only allegations unsupported by fact. This specifically includes the allegations bridging pages 13-14 of appellants' brief. There is simply no factual basis for such allegations. Attorney's argument in a brief cannot take the place of evidence, *In re De Blauwe et al.*, 222 USPQ 191 (CA FC 1984), and *In re Pearson*, 181 USPQ 641 (CCPA 1974).

As to obviousness, the rejections of claims 1, 85-91, 114-115 and 117 is believed to be appropriate as set forth above. The allegation near the bottom of brief page 16, relating to a release agent in Cook or Hommel ignores the teaching of the secondary reference. This argument is essentially an argument that the claims are not anticipated, which is agreed with as the rejection is under 35 U.S.C. 103. Cook and Hommel are to compositions which have utility in explosives. Christman is a patent which has to do with explosives. The combination would be expected to be

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appropriate to one of ordinary skill in the art. Explosive ingredients and compositions inherently would have utility as set forth herein. Indeed, appellants' compositions must explode in milliseconds to be effective in the time available in a car crash. An air bag explosion is counted as an explosion by the observer of the event. There is a loud bang in a time so short as to be essentially instantaneous in human observer terms. The motivation is the taught and usual well known reasons for such additives, as taught in the reference. These claims (1, 85-91, 114-115 and 117) are admitted to stand or fall together as set forth by appellants, except that appellants have urged separate grouping for claims 1 and 117, brief, page 8. Claim 1 is clearly obvious, as already discussed above. It is certainly obvious to do what is taught. As to claim 117, the properties are inherent in the composition, as rendered obvious. Criticisms of ingredients taught in the references, which ingredients are taught useful for appellants purposes in the instant specification, is not a credible argument to overcome the teachings, when appellants' claimed invention reads on the same ingredients and amounts.

The rejection has been withdrawn as to claims 83-84 and 116.



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***Conclusion:***

For the above reasons, it is believed that the rejections are proper and should be sustained.

Respectfully submitted,

Miller/em  
August 13, 2001

CC: HT, CJ  
(conf)



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